84-505

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

DONALD PERCY, et al.,

Petitioners,

v.

CAMEO CONVALESCENT CENTER, INC.,
DRAGOMIR KRESOVIC,
BORISLAV KRESOVIC,
LINDA HINTZ,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

(Pp. 55-115)

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COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

CAMEO CONVALESCENT CENTER, INC., et al.,

Plaintiffs, SPECIAL VERDICT

79-C-570

v.

DONALD E. PERCY, et al.,

Defendants.

---

1. Did any of the defendants prepare notices of violation or prosecute such notices against Cameo Convalescent Center without probable cause?

YES __X__ NO _____

If your answer is "yes", answer questions #2, #3 and #4. If your answer is "no", then skip to question #5.

2. Which of the following defendants, if any, acted with malice in preparing or prosecuting the notices of violation against Cameo Convalescent Center?

_____ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

__X__ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

3. Which defendants, if any, identified in question #2 as having acted with malice are entitled to good faith immunity as that term has been defined for you in the instructions?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

4. Which defendants, if any, identified in question #2 as having acted with malice are entitled to prosecutorial immunity as that term has been defined for you in the instructions?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

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5. Were the notices of violation prepared or prosecuted against Cameo due to an ulterior or improper motive?

YES __X__ NO _____

If your answer is "yes", answer questions #6, #7 and #8. If your answer is "no", skip to question #9.

6. Which of the defendants, if any, threatened or acted in a manner not authorized by the administrative process during the prosecution of these notices of violation?

_____ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

__X__ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

7. Which defendants, if any, identified in question #6 as having acted in a manner not authorized by the administrative process are entitled to good faith immunity as that term has been defined for you?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

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_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

8. Which defendants, if any, identified in question #6 as having acted in a manner not authorized by the administrative process are entitled to prosecutorial immunity as that term has been defined for you?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

9. Were any acts of any defendant motivated by retaliation for plaintiff's exercise of its rights to free speech or to petition the government for redress of grievances?

YES _____ NO __X__

If your answer is "yes", answer questions #10, #11, #12, and #13. If your answer is "no", skip to question #14.

10. Which defendants were so motivated?

_____ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

11. For each defendant identified in question #10 as possessing a retaliatory motive, would that defendant have taken the same actions in the absence of such motive?

DEFENDANTS	YES	NO
Donald Percy	___	___
Robert Durkin	___	___
Charles Fiss	___	___
Peggy Ann Smelser	___	___
Louis Remily	___	___
David Seigel	___	___
Thomas Van De Grift	___	___

Milton Stearns	___	___
Fran Richards	___	___
Darla Senn	___	___
Kathleen Rubin	___	___
Nancy Kacynski	___	___
Janet Zanck	___	___

12. Which defendants, if any, identified in question #10 as possessing a retaliatory motive and for whom you answered "no" in question #11, are entitled to good faith immunity as that term has been defined for you?

_____ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

13. Which defendants, if any, identified in question #10 as possessing a retaliatory motive and for whom you answered "no" in question #11 are entitled to prosecutorial immunity as that term has been defined for you?

_____ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

14. Which of the following defendants, if any, were personally and directly responsible for the placement of Cameo on the suspension of referrals list and acted with intentional or reckless disregard of Cameo's right to appeal such placement?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

15. In the event you find that Cameo was intentionally or recklessly denied a timely hearing on the notices of violation and the imposition of a plan of correction, which of the following defendants, if any, were personally and directly responsible for these acts?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

16. Which defendants, if any, identified in questions #14 or #15 are entitled to good faith immunity as that term has been defined for you in the instructions?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

17. Which defendants, if any, identified in questions #14 or #15 are entitled to prosecutorial immunity as that term has been defined for you in the instructions?

__X__ NONE

_____ Donald Percy

_____ Robert Durkin

_____ Charles Fiss

_____ Peggy Ann Smelser

_____ Louis Remily

_____ David Seigel

_____ Thomas Van De Grift

_____ Milton Stearns

_____ Fran Richards

_____ Darla Senn

_____ Kathleen Rubin

_____ Nancy Kacynski

_____ Janet Zanck

Signed this 23rd day of September, 1982.

/s/_____

Foreperson

TESTIMONY OF NADENE DREHER

September 16, 1982

Direct Examination by Mr. Hesslink

Q Mrs. Dreher, where are you currently employed?

A For the State of Wisconsin, Division of Health, Bureau of Quality Compliance.

Q What is your current job title?

A Program Assistant 1.

Q Has that always been your title at the Bureau of Quality Compliance?

A No.

Q Do you work in the Madison office or one of the district offices?

A In the Madison office.

. . . .

Q During the period of March and April of 1979, was as best you can recall, were your duties, what were your duties and responsiblities?

A I was a receptionist for our area, our room answered telephone; we received the mail for our section and delivered it; would do some typing.

Q As part of your duties and responsibilities at that time, would you accept for and sign documents in pleadings which people would file with the Bureau of Quality Compliance?

A Yes.

Q Now, I show you a document which has been marked as Exhibit No. 111 and on that document in the lower

right-hand corner there is something which is written in green ink. Do you see that?

A Yes.

Q What does that say?

A Received, Bureau of Quality Compliance, Enforcement Section, Nadene R. Dreher, 3-30-'79.

Q Did you in fact, is that your handwriting?

A Yes it is.

Q And, is that your signature?

A Yes, it is.

Q What is the title of the document?

A Notice of Appeal Request for Fair Hearing and Petition for Declaratory Ruling.

. . . .

Q Did you also maintain a log or other tracking mechanism for when appeals were filed for the Suspension of Referrals List?

A I don't recall.

Q Do you recall whether or not you kept track of whether or not an appeal was filed for a notice which had been sent out?

A I don't recall.

Q Well, were you aware that there was such a log being maintained?

A Yes.

Q And, what is your best recollection of who it was who maintained that log?

A I really don't know.

. . . .

Q Do you ever recall indicating to anyone that there was a name of a facility on that list for which you had received an appeal?

A No.

Q Do you have specific recollection you did not indicate that to anyone?

A I don't have any recollection of mentioning it.

Q Do you know that you did not?

A No.

Q What would have been your normal practice with respect to appeals which you received?

A I would give them normally to the person indicated that they were for.

Q The attorney who was assigned to the case?

A If that is the person I was told to give it to, yes.

Q Was in fact the policy during that point in time to give those to the attorney who was assigned to the case?

A Yes.

Q And, do you have any specific recollection that you did not follow that policy with respect to this appeal?

A I have no recollection.

Q Are you aware that Dave Siegel was the attorney who was involved in the Cameo case at that point in time?

A Yes. [Pp. 100-104.]

TESTIMONY OF BORISLAV KRESOVIC
September 14, 1982
Cross examination by Mr. Underwood

A Because I think in point in time I didn't know what it meant because I didn't know we were put on. I didn't get the list. We got the list after the apology so I didn't know. I suspected but --

Q In other words, you got an apology for something --

A That I didn't know.

Q That you weren't aware that you even had been placed on the list yet and you got an apology before you were aware you were placed on the list?

A Yes, sir. [P. 3.]

TESTIMONY OF JANE PRESTON
September 16, 1982
Direct examinatin by Mr. Hesslink

Q. Mrs. Preston, where are you currently employed?

A. I work for the Wisconsin Division of Health, Bureau of Quality Compliance.

Q. And, you work out of the District No. 2 Office?

A. Yes.

Q. How long have you been employed in that position?

A. Since August 14, 1978.

Q. Do you have an occupation or profession?

A. Yes, I do. I am a registered nurse.

Q. How long have you been a registered nurse?

A. Since May 12, 1968.

Q. What is your current job title?

A. I have to [sic] two job titles, one is civil service as a nursing consultant; one, the second is an operative title and that is Health Facility Surveyor, RN classification.

Q. Do you have a function, job, are you a nurse surveyor?

A. That is what RN is.

Q. And, as long as you have worked at the District No. 2 Office, have you always held that same position?

A. Yes.

Q. Are you familiar with Cameo Convalescent Center?

A. Yes, I am.

Q. Were you in fact in Cameo Convalescent Center in either late December of '78 or early January of 1979?

A. Yes, I was.

Q. And, what was the purpose of your visit to Cameo at that point in time?

A. I was conducting what is referred to as a Verification visit of the September, 1978 survey.

Q. Prior to your entering the Cameo facility did you review anything prior to conducting that verification?

A. Yes, I did.

Q. What did you review?

A. I reviewed the Notices of Violation that had been written by the surveyor who conducted the survey and I was listened to the exit tape from the exit interview.

Q. By the "exit tape" you mean the it tape of Darla Senn?

A. Yes.

Q. How did you have occasion to review that exit tape?

A. It was given to me by my supervisor.

Q. That is, who was your supervisor?

A. Fran Richards.

Q. Okay. Was there anyone with you during all or part of this verification visit at Cameo?

A. Yes.

Q. Who was that person?

A. Do you mean facility staff or do you mean Bureau staff?

Q. I meant some other person from the Bureau.

A. Yes, there was.

Q. Who was that person?

A. Ms. Patricia Dosse.

Q. Who is Patricia Dosse?

A. At that time she was also an RN surveyor.

Q. Now, could you describe what occurred when you arrived at Cameo on January 2nd, was it January 2, 1979?

A. I believe the entire verification visit took from December 27 through January 2.

Q. Could you describe what happened when you arrived at Cameo for the verification visit?

A. I introduced myself to the receptionist, presented her with my card, informed her of the purpose of my visit, and then awaited the facility staff.

Q. And, what occurred after that?

A. I was introduced to the Director of Nursing.

Q. Who was the Director of Nursing?

A. Linda Hintz (ph).

Q. Had you known Linds [sic] Hintz prior to that date?

A. Yes, I had.

Q. How had you known Linda Hintz?

A. I was her instructor in nursing school.

Q. Where was that?

A. Elverno College.

Q. Now, what did you do at Cameo with respect to verifying the original survey?

A. I requested three weeks of staffing, a censor sheet for determining the population of the nursing home, had a tour of the facility, reviewed some clinical records, inspected the medication; have an exit interview myself, and I think that was about it.

. . . .

Q. Now, I show you a document which has been marked as Exhibit No. 69, and ask if you have seen that document before?

A. Yes, I have.

Q. Is that in fact your signature on that document?

A. It is.

Q. Is that document your report which you completed at the end of the verification visit at Cameo?

A. It is part of it.

Q. Okay. That is what we call the verification visit log sheet?

A. Log sheet.

Q. Now, as between you and Mrs. Dosse who was it that actually made decisions as to whether or not particular Notices of Violation were corrected or not?

A. It was a mutual decision.

Q. With respect to all of those?

A. Yes. [Pp. 65-69.]

TESTIMONY OF THOMAS VAN DE GRIFT
September 17, 1982
Direct examination by Mr. Hoornstra

Q. When did you discovery [sic] that Cameo had appealed?

A. On approximately April 12, 1979.

Q. All right. Do you remember what the law was at the time as to whether or not a nursing home that had appealed the decision to put them on the Suspension of Referrals List could be put on the List?

A. The law at that time was that if a home appealed from the List, that submitted a timely appeal, they have 10 days in which to appeal--if they submitted a timely appeal, they would not be placed on the published List.

Q. What action did you take, if any, when you discovered Cameo had appealed?

A. The first thing we did was to attempt to determine whether or not the appeal was timely submitted.

Q. What did you do to determine that?

A. The appeal was submitted on a blueback. It was a formal pleading. And, there was a place for a verification of the attorney's signature on the bottom of the last page. It was signed, but it was not dated. There was no other date on the document. So, we were unable to determine just be [sic] looking at the document when it was served or even when it was dated. And, I felt the first thing we ought to do is contact the person who verified the attorney's signature.

Q. Before you proceed--let me interrupt, and would you explain to the jury why it was important to determine the date?

A. The date for the, for the appeal, had long since passed. And, if, in other words, we knew what time, at what time the notice went to Cameo, when it was received, and so we were able to measure the 10 days in which they had time to appeal; and that 10 days terminated on April 30, excuse me--March 30, 1979.

Q. Okay. Proceed then, to tell the jury what you did to determine whether Cameo had appealed on time?

A. I asked David Siegel if he had any memory of when he received it and he indicated not. I asked people in, within the Bureau if they had

some knowledge as to how or when this thing was received. And finally, I asked--excuse me--I called the person whose name appeared on the appeal, who verified the attorney's signature. I called that person and asked when she had signed the document.

Q. Do you remember who that person was?

A. Jean Sodderholm, I believe her name was.

Q. Do you know what her connection with Cameo or its attorney was?

A. Jean Sodderholm is an attorney in Mr. Hesslink's firm.

Q. Please go ahead.

A. She indicated to me she had signed the document, verified Mr. Hesslink's signature on March 30,

1979. I then asked one of the clerical people in the Bureau of Quality Compliance, and I believe it was Nadene Dreher, to take the document over to Mr. Hesslink's firm and have her insert the date.

Q. Which document?

A. The document which was the appeal from the Suspension of Referrals List, the document submitted by Mr. Hesslink.

Q. Your direction to her was what?

A. I asked her to take the document to Jean Sodderholm, in Mr. Hesslink's firm, have her insert the date on which she verified Mr. Hesslink's signature.

Q. Okay, then what happened?

A. She came back with the document and it showed the date March 30, 1979.

Q. Do you remember by what date Cameo had to have its appeal in?

A. They had to have it in by March 30, 1979. Now, at this point we had no certain way of determining whether or not the appeal was timely. So we finally, when I say "we", I mean David Siegel and myself finally concluded--

Q. Explain to the jury why you had no certain way to determine whether they had appealed on time?

A. Because we did not know how or when the document came into the office. I was present when the document was first discovered in the office. I was in a room in an office that was shared by David Siegel and by another attorney on the staff named Dolores Kester. I was seated at my desk as was

Delores. Dave came in the office, our office.

Q. Dave?

A. Siegel. He had been out somewhere and he had a stack of--

Mr. HESSLINK: I object, your Honor, this is all hearsay.

THE COURT: Well, I believe he is testifying as to those items he observed. If there is hearsay that will be stricken.

MR. HOORNSTRA: I will be glad to lay the foundation.

BY MR. HOORNSTRA:

Q. Are you describing what you observed?

A. That's correct.

Q. Please proceed.

A. I was seated at my desk and Dave Siegel came in and he had been out of the office for a day or two. My

memory is he was out of town. There was a stack of mail on the left-hand corner of his desk that was about eight to ten inches high. He stood at his desk and proceeded to go through his mail. After he had gone through a number of documents he exclaimed something, some expletive, and asked what was this. And I asked him what he was referring to, and he showed me the document. And he asked me how it got there, and I said, "I do not know."

Q. Whose office were you --

A. I was in Dave Siegel's office and my office. We shared the same office. He expressed concern, said, "I didn't realize this was here."

MR. HESSLINK: Objection, your Honor.

THE COURT: Sustained.

THE WITNESS: He then left the office and came back shortly thereafter.

BY MR. HOORNSTRA:

Q. Return if you will, to your earlier discussion about ascertaining whether Cameo had appealed on time. Did you finally decide with certainty whether Cameo had appealed on time?

A. No, we never did. We had no way of determining on what date that document came into the office. I could find no one who could tell me how the document got into the office or, on what date it got into the office, so we finally concluded we would give them the benefit of

the doubt and we presumed the document was served on the date it was verified by Jean Sodderholm which was March 30; and therefore presumed it was timely submitted.

Q. May I have your exhibit? Mr. Vande Grift, I am showing you what has been marked as Exhibit 111, and it has been received. I believe as the Cameo appeal paper. And I call your attention to the first page that shows the writing of Nadene Dreher, and ask whether it was that on the paper you had in your office when you were trying to determine whether Cameo had appealed on time?

A. It was not.

Q. All right. Look at the second page, and where there exists the

verification blanks, and I ask whether or not, describe what part was blank on the copy you received?

A. The part that was blank was the date on which the person verifying Mr. Hesslink's signature, verifying it--it showed blank day of March, 1979. There was no date inserted for day.

Q. All right. What steps, if any, did you take once you learned and decided to treat their appeal as one having been filed on time?

A. After having determined that it was timely filed, um, I then contacted Peg Smelser, and that would have taken place, to the best of my recollection, on the following day, which was April 13, 1979. April 13

was Good Friday. The office was open half a day and we had approximately half our staff or less present.

Q. What did you tell Peg?

A. I informed her of the mistake. Because I knew that Cameo had appeared on the Suspension of Referrals List. And I advised her, I then asked her whether or not we had received any communication from either the Kresovics or Mr. Hesslink. And she said, "No." I told her then that before we could receive any communication from them whatever, any kind of complaint, any kind of appeal, that we should get the correction out. I said it was very important that we respond without any input from them.

Q. Why did you say that?

A. Because I suspected that they would attempt to make an issue out of it. So I told her even though it was Good Friday that the document correcting the mistake had to go out that day and that a copy at a minimum had to be delivered to Mr. Hesslink that day.

Q. Copy of what?

A. A copy of the letter correcting the error, placing Cameo on the Suspension of Referrals List.

Q. Do you know whether such a letter went out that day?

A. Yes, it did.

Q. I am going to show you what has been received, I believe, as Exhibit 134, purporting to be a

letter from Mr. Fiss to Mr. Kresovic of April 13, and asked [sic] whether or not that is the letter you referred to?

A. It is the letter to which I have referred.

Q. Okay, I now show you what has been marked as Exhibit 1054, and ask--which purports to be a letter from Mr. Fiss to various county agencies, and ask whether you can identify that?

A. That is also the document that was prepared to correct the error. [Pp. 108-15.]

TESTIMONY OF DRAGOMIR KRESOVIC
September 15, 1982
Direct examination by Mr. Hesslink

Q What was the next involvement you had with any of the State surveyors following that initial conference?

A During the survey, I afforded my office, my desk, my telephone to Darla Senn, registered nurse.

Q And what contact did you have with her?

A She asked for policy manuals, procedure books, agreements with independent providers and other paper compliance manuals.

Q And what did you do with respect to that request?

A I afforded her sets of books and provided her agreements, whatever she asked for.

Q Did Mrs. Senn ever request any information from you during the

survey process which you did not provide?

. . . .

THE WITNESS: I provided everything she requested.

. . . .

Q What was your next contact with Mrs. Senn?

A As she begun review of those documents, she asked me to come in and to respond to some of her questions.

Q What were the questions that you had?

A Number one, she asked me why don't I have a job description for the medical director.

. . . .

[Pp. 48-50.]

Q Did you, in fact, accompany Mrs. Senn when she did the tour of the building?

A Yes, I did.

Q Okay. Did anyone else accompany you and Mrs. Senn?

A I believe there were some other nurses, yes. [P. 52.]

. . . .

Q Were you present at the 1978 exit interview at Cameo?

A Yes, sir, I was. [P. 58.]

. . . .

Q Go ahead. Describe what happened.

A The exit interview started at eleven o'clock in the morning on September 19, 1978. Present were Mr. Gunderson as a chairperson, Darla Senn as a registered nurse surveyor, Ms. Nancy Kacynski as social worker surveyor. Members of

our staff were Mr. Bob Hesslink as attorney, Mrs. Miriam McDonald, Bob Kresovic, myself, Linda Hintz, Dr. Stoola. . . . [Pp. 59-60.]

State of Wisconsin
Department of Health
and Social Services

DATE: April 13, 1979

TO: All County Social Service Agencies, 51.42 and 51.437 Boards and other interested parties

FROM: Charles J. Fiss, Jr.
Director
Bureau of Quality Compliance

RE: Cameo Convalescent Center

Please note that Cameo Convalescent Center, license #2230, was placed on the April, 1979 Suspension of Referrals List in error. Please disregard this listing. Residents may be referred to the facility without restriction.

Please accept our apologies for any confusion or inconvenience this may have caused your agency.

CJF:dle

State of Wisconsin
Department of Health
and Social Services

April 13, 1979

Dragomir Kresovic
Administrator
Cameo Convalescent Center
5790 South 27th Street
Milwaukee, WI 53221

Dear Mr. Kresovic:

Please be advised the Bureau of Quality Compliance has rescinded its decision to place Cameo on the Suspension of Referral List pursuant to Chapter 50, Wis. Stats. Your appeal of the decision to place Cameo on the Suspension of Referral List was not discovered until after the list had been published.

We regret the error and are now advising the recipients of the list that Cameo

has been removed and may admit patients without restriction.

Sincerely,

Charles J. Fiss, Jr.
Director
Bureau of Quality Compliance

CJF:dle

cc: Robert M. Hesslink, Jr.

Wis. Stats. (1977) sec. 50.03(11)(a) and (b), 1977 Wis. Laws ch. 170, sec. 28:

> 50.03(11) JUDICIAL REVIEW. (a) All administrative remedies shall be exhausted before an agency determination under this subchapter shall be subject to judicial review. Final decisions after hearing shall be subject to judicial review exclusively as provided in s. 227.15, except that any petition for review of department action under this chapter shall be filed within 15 days after receipt of notice of the final agency determination.
>
> (b) The court may stay enforcement s. 227.17 of the department's final decision if a showing is made that there is a substantial probability that the party seeking review will prevail on the merits and will suffer irreparable harm if a stay is not granted, and that the facility will meet the requirements of this subchapter and the rules established under this subchapter during such stay. Where a stay is granted the court may impose such conditions on the granting of the stay as may be necessary to safeguard the lives, health, rights, safety and welfare of

residents, and to assure compliance by the facilty with the requirements of this subchapter.

Wis. Stats. (1977) sec. 50.04(3) and (4), 1977 Wis. Laws ch. 170, sec. 29:

(3) INSPECTION REPORTS. (a) Inspection. The department shall make or cause to be made at least one inspection annually of each nursing home in the state within 120 days prior to license issuance or renewal.

(b) Annual report. The department shall make at least one report on each nursing home in the state annually. All conditions and practices not in compliance with applicable standards within the last year shall be specifically stated. If a violation is corrected, is contested or is subject to an approved plan of correction, the same shall be specified in the annual report. The department shall send a copy of the report to the nursing home and shall provide a copy to any person on request. The department may charge a reasonable fee to cover copying costs.

(c) Posting of notice. The nursing home administrator shall retain a copy of the most recent annual report prepared by the

department under par. (b) and shall post in a place readily visible to residents and visitors, such as the lobby or reception area of the facility, a notice stating that a copy of the report is available for public inspection on request to the administrator and that a copy will be provided by the department upon request for a minimal fee.

(4) NOTICE OF VIOLATION; CORRECTION. (a) Notice of violation. If upon inspection or investigation the department determines that a nursing home is in violation of this subchapter or the rule promulgated thereunder, it shall promptly serve a notice of violation upon the licensee. Each notice of violation shall be prepared in writing and shall specify the nature of the violation, and the statutory provision or rule alleged to have been violated. The notice shall inform the licensee of the right to a hearing under par. (e) and of the provisions for placement of the nursing home on the list prepared under par. (d), if applicable. The written notice of a class "A" violation may be written and served by an agent of the department at the time of the inspection.

(b) Classification of violations. 1. A class "A" violation is a violation of this subchapter or of the rules promulgated thereunder which

creates a condition or occurrence relating to the operation and maintenance of a nursing home presenting a substantial probability that death or serious mental or physical harm to a resident will result therefrom.

2. A class "B" violation is a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home directly threatening to the health, safety or welfare of a resident.

(3) A class "C" violation is a violation of this subchapter or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a nursing home which does not directly threaten the health, safety or welfare of a resident.

4. Each day of violation constitutes a separate violation. Except as provided in sub. (5)(a)4, the department shall have the burden of showing that a violation existed on each day for which a forfeiture is assessed. No forfeiture may be assessed for a condition for which the nursing home has received a variance or waiver of a standard.

(c) Correction. 1. The situation, condition or practice constituting a class "A" violation shall be abated or eliminated immediately unless a fixed period of time, as determined by the department and specified in the notice of violation, is required for correction. If the class "A" violation is not abated or eliminated within the specified time period, the department shall maintain an action in circuit court for injunction or other process against the licensee, owner, operator, administrator or representative of the facility to restrain and enjoin violation of applicable rules, regulations and statutes.

2. At the time of issuance of a notice of a class "B" or "C" violation, the department shall request a plan of correction which is subject to the department's approval. The nursing home shall have 15 days after receipt of notice of violation in which to prepare and submit a plan of correction but the department may extend this period up to 30 days where correction involves substantial capital improvement. The plan shall include a fixed time period within which violations are to be corrected. If the nursing home plan of correction is substantially in compliance, it may be modified upon agreement between

the department and the nursing home to achieve full compliance. If it rejects a plan of correction, the department shall send notice of the rejection and the reason for the rejection to the nursing home and impose a plan of correction. The imposed plan of correction may be modified upon agreement between the department and the nursing home.

3. If the violation has been corrected prior to submission and approval of a plan of correction, the nursing home may submit a report of correction in place of a plan of correction. Such report shall be signed by the administrator under oath.

4. Upon a licensee's petition, the department shall determine whether to grant a licensee's request for an extended correction time. Such petition must be served on the department prior to expiration of the correction time originally approved. The burden of proof is on the petitioner to show good cause for not being able to comply with the original correction time approved.

(d) Suspension of referrals. The department shall prepare on a monthly basis a list containing the names and addresses of all nursing homes with existing class "A" violations as defined in par. (b) 1 or with 5 or more existing

violations of any type, for which a plan of correction has not been timely submitted to the department under par. (c), for which a plan of correction has been disapproved or for which an approved plan of correction has not been carried out. A copy of the monthly list of violators shall be sent to each county welfare director and each s. 51.42 or 51.437 board director in the county in which each nursing home listed is located. The department shall notify each nursing home placed on the list of such placement at least 10 days prior to issuance of the list. No nursing home may be placed on the list unless a hearing has been held under par. (e) and a final determination has been made by the department or the time for requesting a hearing has passed and no request has been made. A nursing home shall be removed from the list when all corrections are made or when a plan of correction for all deficiencies is approved by the department. The list shall indicate those nursing homes which have been removed from the list during the prior month.

2. No county social services department or board under s. 51.42 or 51.437 may refer persons to nursing homes on the list prepared under this paragraph.

3. No nursing home which is placed on the list prepared under this paragraph due to an existing class "A" violation or due to 5 or more existing class "B" violations may admit residents until it is removed from the list. Violation of this subdivision constitutes a class "B" violation.

4. The department may make exceptions to subd. 2 or 3 where there is a lack of facilities of the same type in the area sufficient to satisfy the demand for the type of service provided by the home.

5. The department may provide information from the list to any agencies which make referrals to nursing homes.

(e) Hearings. 1. If a nusing home desires to contest any department action under this subsection, including rejection and imposition of a plan of correction, or suspension of referrals or admissions, it shall send a written request for a hearing under s. 227.07 to the department within 10 days of receipt of notice of the contested action. All agency action under this subsection arising out of a violation or rejection and imposition of a plan of correction shall be the subject of a single hearing. The department shall commence the hearing within 30 days of the

request for hearing, within 30 days of the department's imposition of a plan of correction, whichever is later. The department shall send notice to the nursing home in conformance with s. 227.07. Issues litigated at the hearing may not be relitigated at subsequent hearings under this paragraph arising out of the same violation.

2. The department shall notify the nursing home of its decision to reverse, modify or uphold the contested action within 10 days after the close of the hearing.

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